


Government of the District of Columbia
Office of the Chief Financial Officer



Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO: The Honorable Linda W. Cropp
Chair, Council of the District of Columbia

FROM: Natwar M. Gandhi
Chief Financial Officer 

DATE: DEC 19 2006

SUBJECT: Fiscal Impact Statement: "Criminal Record Sealing Act of 2006"

REFERENCE: Bill Number 16-746 (Committee Print, October 30, 2006)

Findings

1. Funds would need to be added to the FY 2007 through FY 2010 budget and financial plan to implement the provisions of the proposed legislation.
2. Due to the uncertainty as to how sealing will affect the day-to-day operations of both the Office of the Attorney General (OAG) and the Metropolitan Police Department (MPD)—an uncertainty that is reflected below in the form of alternative assumptions regarding five separate factors (which are detailed below) that will define the OAG and MDP workload—this Fiscal Impact Statement provides both a "low" and "high" cost estimate.^{1, 2}
3. There is a further complexity that in making these cost estimates, one must distinguish between (i) costs to be incurred by OAG and MPD with respect to only that set of filings that will be "current/going forward" following the implementation of this legislation and (ii) costs associated with "retroactive" filings (filings for sealing with respect to activities that occurred prior to the implementation of this legislation). Moreover, in both cases,

¹ To generalize: the "low" ("high") cost estimate assumes that a lower (higher) percentage of movants will file to seal and that the OAG will contest fewer (many) motions. The term "movant" refers to the party in a legal proceeding who makes a motion on/application for a court order/judgment to seal a record.

² Source: ORA analysis of Council of the District of Columbia, Committee on the Judiciary, Committee Report on Bill 16-746, October 30, 2006.

current/going-forward and retroactive, MPD also processes sealing orders that result from cases handled by the US Attorney's Office (USAO).

4. The detail of both the (i) operational assumptions and (ii) the current/going-forward and retroactive periods are provided below. In all cases the resulting estimates are presented for each year of the four year period FY 2007—FY 2010 as well as for the total sum of the cost over this four year period.

5. For all the variants it is assumed that OAG and MPD are now (FY 2007), and will for the future (FY 2008-2010), be operating at full capacity. That is, there are no un/underemployed resources that can be freed-up to address the demands of the proposed legislation (low and high estimates alike).³

To summarize:

- For the OAG: Taking into account movant filings for both past activities ("retroactive") and activities yet to be contested ("going forward"), implementation of the legislation would result in increased costs in the range of \$0.8m (the low estimate) and \$1.7m (the high end of the range) in FY 2007 and \$5.5m and \$12.5m for Fiscal Years 2007 through 2010. Note that estimates for FY 2007 reflect half-year estimates (one can get a better idea of recurring annual costs by looking at the FY 2008 numbers).
- For the MPD: The legislation would result in increased costs in the range of \$0.3m and \$1.0m in FY 2007 and \$2.1m and \$7.1m for Fiscal Years 2007 through 2010.
- Total Costs (OAG and MPD combined): Increased costs range from a low of \$1.1m to a high of \$2.7m in FY 2007 and from \$7.6m to \$19.5m when summed over the four year period, FY 2007-FY 2010. It is this third bullet point that reflects total costs for both agencies and that also takes into account filings, going forward and retroactive that merits special attention by the City Council.

Background

The Criminal Record Sealing Act of 2006 (CRSA) would amend Title 16 of D.C. Official Code to establish a process for sealing certain criminal records in cases of actual innocence, arrests, and for certain misdemeanor and felony convictions. The rationale for sealing of criminal records is that for certain arrests and/or convictions, the interests of

³ The estimate for OAG does not include Nonpersonal Services (NPS) costs. OAG estimates that NPS costs for the annual caseload (non-retroactive portion of the legislation) will total \$1.64 million over FY 2007-08. Of this total, \$1.5 million is for an "electronic document storage system." While this may improve the general operational capacity of OAG, it is not clear the proposed legislation requires the purchase of such a system and, thus, these NPS numbers are excluded from the FIS cost numbers. This decision to exclude is not to be taken as a judgment as to the merits of OAG's requests with respect to future regular budget.

the individual's rehabilitation outweigh the interests of public access to criminal records (a sealing does not expunge any activity from internal MPD records).

Proposed Legislation

CRSA permits the movant to file record if the person has been:

- arrested or charged with any offense, but is not convicted and maintains his or her actual innocence. Under these circumstances the movant may file a motion to seal with no waiting period. If such a motion is filed within 4 years of the arrest, a "preponderance of evidence" is required in order to have the record sealed. However, if the movant files after 4 years of arrest, "clear and convincing evidence" is required in order to have the record sealed.⁴
- arrested or charged with an "eligible misdemeanor" but is not convicted, the movant must wait two years after the arrest and must not have a "disqualifying arrest or conviction" to file a motion to seal.⁵ The movant must present a preponderance of evidence to have a record sealed.
- arrested or charged with an "ineligible misdemeanor or felony" but is not convicted, the movant must wait five years after arrest and must not have a disqualifying arrest or conviction. The movant must present a preponderance of evidence to have a record sealed.
- convicted of any other misdemeanor or felony, the defendant must wait ten years (following the completion of the sentence) and must not have a disqualifying arrest or conviction. The movant must present clear and convincing evidence to have a record sealed. Here it should be noted that the only felony charge that is eligible for sealing is "failure to appear".⁶

Current Rules

Under current arrangements, criminal record sealing is guided by court decisions and an assortment of statutes. The most important of these, Rule 118 of the Superior Court Rules of Criminal Procedure, provides for the sealing of arrest records in cases of actual innocence, provided that the arrestee presents "clear and convincing evidence" of innocence. Under Rule 118, an arrestee generally must file a motion to seal within 120 days after charges have been dismissed. In addition Rule 118 applies only to cases in which charges are dropped prior to trial but not to acquittals.

⁴ This fiscal note does not address the distinction between "preponderance" vs. "clear and convincing" evidence.

⁵ CRSA provides a list of ineligible misdemeanors. Any misdemeanor that is not explicitly identified as "ineligible" is, thus, eligible for sealing.

⁶ D.C. Official Code § 23-1327.

In addition to Rule 118, there are statutory provisions in the District that allow for sealing in certain limited circumstances other than actual innocence. These include provisions for first-time drug offenders, under-age drinking, parental kidnapping, and certain offenses committed by juveniles.

The Office of the Attorney General estimates that under current law, there are approximately 180 motions filed for sealing annually. The Metropolitan Police Department's (MPD) Records Division processes about 300 sealing orders per year.⁷ The proposed legislation would expand the universe of cases to include misdemeanor convictions and failure-to-appear felony arrests, rather than just misdemeanor arrests, thus leading to an increase in filings and sealings.

Financial Plan Impact

The fiscal impact of the proposed legislation will depend on the following five factors:

- Number of eligible cases;
- Number of motions filed to seal criminal records;
- Number of sealing motions contested by the OAG;
- Number of motions litigated;
- Number of motions resulting in sealing orders.

Reflecting the uncertainty as to how these five factors will play out due to yet-to-be determined OAG and MDP policy and administrative actions, the CRSA fiscal impact is presented with a low and a high estimate. The differences in the two estimates are based on variations in the underlying assumptions as identified below.

In addition, the proposed legislation is retroactive without a time limit, so that a movant meeting the requirements of the legislation could file a motion to seal a criminal record generated at any time in the past. The retroactive provision in particular makes it difficult to estimate the filing rate for criminal records generated in the past.

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⁷ Costs to the MPD are a result of the contestation, litigation, and sealing activity generated by the OAG and the USAO. Thus, the volume of filed motions and the subsequent activities of OAG and USAO are the primary determinants of the MPD workload. An additional factor that could have a fiscal impact is the standard of evidence required to succeed in a motion to seal a criminal record. The standard of evidence in cases of arrests – preponderance – is likely to increase the success rate for motions to seal, compared to the higher standard in cases of convictions – clear and convincing. However, it is not possible to quantify the impact of the lower standard of evidence on actual sealing outcomes. It is simply noted here as an additional factor that could affect the cost of this legislation.

Current and Going Forward

The annual fiscal impact for the proposed legislation going forward is based on the following set of assumptions:

- Number of Eligible Cases.

There are approximately 20,000 misdemeanor, traffic, and "post and forfeit" cases annually in the OAG's jurisdiction and another 20,000 felony and U.S. misdemeanor cases annually in the jurisdiction of the United States Attorneys Office (USAO).⁸

- Under the assumption that 2/3 of the annual dispositions will be ineligible for motions to seal due to disqualifying convictions or ineligible crimes, there would be approximately 7,000 eligible cases in OAG's jurisdiction and 7,000 in USAO's jurisdiction (this is part of the "low" cost estimate).
- Under a more conservative assumption that 1/3 of the annual dispositions will be ineligible for motions to seal, due to disqualifying convictions or ineligible crimes, there would be approximately 13,000 eligible cases in OAG's jurisdiction and 14,000 in USAO's jurisdiction (high cost estimate).⁹

⁸ Estimates of eligible cases are based on ORA analysis of data from the "Criminal Division Case Activity for 2005" (D.C. Courts, *2005 Annual Report*, page 67) and from the OAG and USAO. The estimate for the number of "post and forfeit" cases is from the MPD. The 13,000 figure is estimated by adding the total number of arrests without convictions for D.C. Misdemeanors (2,480), arrests without convictions for Traffic violations (6,263), D.C. Misdemeanor convictions (812), and Traffic convictions (2,961) – a total of 12,516. In addition to these cases, there are approximately 7,000 "post and forfeit" cases, for a total of 19,516 potentially eligible cases. Based on information from OAG, approximately half of the D.C. convictions – 3,773 – will be ineligible, leaving a total of about 1,887 potential convictions. In addition, we estimate (based on discussions with USAO), that about two-thirds of the non-convictions, or 10,495, will be eligible for motions to seal. In addition to this total (12,382), OAG estimates that there will be about 720 "actual innocence" filings, for a total of 13,102 potentially eligible cases. USAO estimates that of a total of 10,786 misdemeanor arrests, 3,618 felony arrests, and 5,934 misdemeanor convictions, approximately two-thirds, or 13,560, will be potentially eligible for motions to seal. This fiscal impact statement addresses the costs to the District of Columbia budget and financial plan only. The number of cases under the USAO's jurisdiction is noted here because litigation and sealing orders from USAO will generate costs for MPD.

⁹ The estimate for OAG is based on information from OAG that 1/3 of the non-convictions will be eligible and 1/2 of the convictions will be eligible for sealing motions.

- Number of Motions Filed.¹⁰
 - In the lower estimate, approximately 20% of the movants in eligible cases are likely to file a motion to seal their criminal records.
 - Under a more conservative assumption, approximately 35% of the movants in eligible cases are likely to file a motion to have their criminal records sealed.
- Number of Cases Contested.

Upon receiving a motion to seal a criminal record, the OAG must decide whether or not to contest the motion. A decision to contest is likely to be based upon a number of factors, such as the severity of the arrest or conviction, the movant's record since the arrest or conviction, and the relative importance of other OAG duties compared to sealing work.

- The lower estimate assumes that OAG will contest 50% of the motions filed.
 - The higher contestation rate, which reflects the expressed intention of OAG, assumes that OAG will contest 75% of the motions filed.¹¹
- Number of Motions Litigated.
 - After a motion is contested, OAG and USAO must decide whether or not to litigate the case or otherwise settle without going to a hearing. Given the expense involved in litigation and the competing demand on OAG and USAO resources, it is likely that litigation rates will be relatively low.
 - For both estimates it has been assumed that OAG can be expected to litigate approximately 30% of the motions contested and the USAO to litigate approximately 10% of the motions filed.¹²

¹⁰ Estimating with precision the rate of filing is difficult. However, based on the filing rate in neighboring Montgomery and Prince Georges Counties (MD) – approximately 20% under a narrower scope of eligibility than the proposed District legislation – the low estimate is based on the assumption that the rate of filings will be consistent with the existing rates in these other jurisdictions. On the other hand, OAG provided three sets of estimated "filing rates" – 20%, 35%, and 50%. Based on the likely increase in filings due to the expanded range of cases and the increased incentive to file for sealing, we estimate a likely rate of 35%, or the middle estimate from OAG. The increased incentive results from a presumably greater importance of sealing a conviction, rather than sealing an arrest only.

¹¹ Under current District provisions, the OAG contests approximately 75% of motions to seal criminal records. While it is possible that this high rate of contestation would decline if the number of motions increases, it is also likely that OAG will seek to contest the same percentage of cases because the legislation expands the universe of cases to include misdemeanor convictions and felony arrests, rather than just arrests.

¹² Litigation (as distinct from contestation rates) for USAO are included here because MPD will incur costs when USAO litigates. USAO reported data for "estimated hearings" (i.e. litigations) as a percentage of total motions filed. Thus, a 10% rate based on motions filed is higher than a 30% rate based on contested cases. Given the more serious nature of crimes that USAO handles (e.g. felony arrests), it is logical that the litigation rate would be higher than that of OAG.

Approximately 50% of the motions filed "going forward" are expected to result in seal orders.¹³

Retroactivity

The fiscal impact for the retroactive provision of the proposed legislation is based on similar assumptions with respect to the ongoing annual costs, with a few differences.

First, the estimate for the percentage of movants likely to file a motion to seal a criminal record is assumed to be lower than the annual estimates of 20% or 35%. While the percentage of eligible movants who file may be higher than for the recent past, it is expected that this retroactivity percentage will be for lower due to factors such as migration out of the area, death, and lack of knowledge about the legislation.

Second, the rate of contestation could decrease substantially for older cases. For example, if a movant files to seal an arrest record from 20 years ago, the OAG may be less likely to contest the motion if the movant has a clean record and stable employment, compared to a movant who files to seal an arrest record immediately after the mandatory waiting period.

Because of the uncertainties listed above regarding filing and contesting cases originating several years ago, the low and high estimates are based on the same assumptions for filing and contesting as the corresponding annual estimates. However, the estimates are also based on a 10-year period of retroactivity. There is tradeoff between extending the analysis further back and holding the same assumptions about filing and contesting. Including a longer period in the retroactive analysis would generate more potential cases, thus raising the potential cost of the proposed legislation. On the other hand, an adjustment would likely have to be made to lower assumptions about filing rates, contestation rates, and litigation rates. There is no clear evidence that choosing one method over the other will generate substantial differences in the fiscal impact estimates.

Finally, the fiscal effect of cases occurring prior to the implementation of the legislation are assumed to be phased-in rather than incurred the first one-to-two years. For purposes here, it is assumed that across the four-year budget and financial plan approximately 60% of the backlog cases will be addressed (thus, the costs are spread out evenly at 15% per year for each of the four years).

¹³ There are numerous factors that will determine whether a sealing motion is granted, such as contestation by OAG, standard of evidence required, and the involvement of a defense attorney in the case. For example, greater contestation of motions could lead to a lower rate of sealing. On the other hand, greater involvement of defense attorneys could lead to a higher rate of sealing. It is not possible to measure with precision the different configurations affecting a decision to seal; therefore, the assumption is that half of the motions filed will result in orders to seal.

The table below provides the range of estimates of the fiscal impact of CRSA.

Table 1. Impacts to the Financial Plan of the Criminal Record Sealing Act of 2006 (S in millions)					
Item	FY 2007	FY 2008	FY 2009	FY 2010	4-Year Total
Current and Going Forward					
Office of Attorney General					
<i>Low Estimate</i>	\$0.3	\$0.6	\$0.6	\$0.7	\$2.2
<i>High Estimate</i>	\$0.7	\$1.4	\$1.4	\$1.5	\$5.0
Metropolitan Police Department					
<i>Low Estimate</i>	\$0.1	\$0.2	\$0.3	\$0.3	\$0.9
<i>High Estimate</i>	\$0.4	\$0.8	\$0.8	\$0.8	\$2.8
Annual Costs – Current					
<i>Low Estimate</i>	\$0.4	\$0.8	\$0.9	\$1.0	\$3.1
<i>High Estimate</i>	\$1.1	\$2.2	\$2.2	\$2.3	\$7.8
Retroactive					
Office of Attorney General					
<i>Low Estimate</i>	\$0.5	\$0.9	\$1.0	\$1.0	\$3.4
<i>High Estimate</i>	\$1.0	\$2.1	\$2.1	\$2.2	\$7.4
Metropolitan Police Department					
<i>Low Estimate</i>	\$0.2	\$0.4	\$0.4	\$0.4	\$1.4
<i>High Estimate</i>	\$0.6	\$1.2	\$1.2	\$1.3	\$4.3
Annual Costs – Retroactive					
<i>Low Estimate</i>	\$0.7	\$1.3	\$1.4	\$1.4	\$4.8
<i>High Estimate</i>	\$1.6	\$3.3	\$3.3	\$3.5	\$11.7
Current/Going Forward and Retroactive Total					
Office of Attorney General					
<i>Low Estimate</i>	\$0.8	\$1.5	\$1.6	\$1.6	\$5.5
<i>High Estimate</i>	\$1.7	\$3.5	\$3.6	\$3.7	\$12.5
Metropolitan Police Department					
<i>Low Estimate</i>	\$0.3	\$0.6	\$0.6	\$0.6	\$2.1
<i>High Estimate</i>	\$1.0	\$2.0	\$2.0	\$2.1	\$7.1
Total Annual Costs Current and Retroactive					
<i>Low Estimate</i>	\$1.1	\$2.1	\$2.2	\$2.2	\$7.6
<i>High Estimate</i>	\$2.7	\$5.4	\$5.6	\$5.8	\$19.5

Note: Figures for FY 2007 reflect half-year estimates. The data for making cost estimates were provided to ORA by OAG, MPD, and USAO